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IN THE

Supreme Court of the United States

October Term, 1969

No. 465

EDWARD SERZYSKO,

Petitioner,

—v.—

THE CHASE MANHATTAN BANK,

Respondent.

PETITIONER'S REPLY BRIEF

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(1)

The Respondent relies heavily on such common law defensive principles as estoppel, waiver and assumption of risk to defeat the Petition. Its reliance, however, is misplaced. Even if it were to be assumed that such defenses would otherwise be valid in the situation at bar, it is submitted that these common law doctrines which have their genesis in litigation and claims involving only adverse parties, have no place where a private suit serves an important public purpose, thus making the general public, in effect, a Third Party Beneficiary. Mr. Justice Black, in discussing the doctrine of *pari delicto* in *Perma Life Mufflers, Inc.* v. *International Parts Corporation*, 392 U. S. 134 (1968) had this to say on that subject, at page 138:

> "We have often indicated the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes."

As shown in Petitioner's main brief, the dominant purpose of the statutory margin provisions is to provide an effective method of reducing the aggregate amount of the nation's credit resources which can be directed by speculation into the stock market and out of the other more desirable uses of commerce and industry. Private suits are its most effective enforcement vehicle, and should not be frustrated by common law defensive principles.

However, even aside from the public policy doctrine enunciated by Mr. Justice Black, wherein the sole test appears to be whether or not a public purpose is served in allowing the suit, the defendant's reliance on these common law defenses would not be well taken.

The defendant urges that the plaintiff is estopped but one of the indispensable elements of estoppel is ignorance of the true facts on the part of the party who invokes the doctrine. There can be no application of the principle where both parties are fully aware of the real situation and it is crystal clear that the Respondent knew the purpose for which the Petitioner borrowed the funds. (See Petitioner's main brief at pages 5 and 6).

Both the District Court and Respondent rely heavily on *Moscarelli* v. *Stamm*, 288 F.Supp. 453 as a parallel case to the one at bar and standing for the proposition that to reward a "wrong-doer" would subvert the policy and purpose of the margin requirements. The facts in the *Moscarelli* case are a far cry from those in the case at bar. *Moscarelli* involved a motion for summary judgment by the plaintiffs against the defendant for, among other things, a violation of Regulation T (comparable to U but applicable to brokers). The defendant's answering affidavits maintained that the plaintiffs had conspired with certain dishonest employees of the defendant to purchase large

quantities of stock without adequate security, and that the defendant was ignorant of the acts of its dishonest employees and the victim of the conspiracy. In that context, the Court denied plaintiffs' motion for summary judgment on the ground that they wilfully participated in the violation of the Regulation. Obviously, to permit recovery in such a situation would encourage dishonest investors to induce dishonest employees to perpetrate violations of the statute and would defeat its purpose. That type of situation cannot be equated with the facts of the case at bar where the alleged participation consisted at worst of a misrepresentation of the purpose of the borrowings.

(2)

The Respondent maintains that the Petitioner is barred under the doctrine of *pari delicto*. It contends that while the Respondent may have been guilty of violating Regulation U, the Petitioner (who was neither a broker or a dealer but a simple securities salesman) was guilty at the same time, of violating Regulation T. In support of that claim, Respondent cites an administrative decision of the Securities Exchange Commission of doubtful logic which was rendered in 1963, some five years after the commencement of the dealing between the plaintiff and the defendant. Even if the claim of the Respondent is accurate and the Petitioner was guilty of violating Regulation T, he would nonetheless not be barred under the common law doctrine of *pari delicto*. *Pari delicto* means equal fault and, it is true that if the parties are equally at fault, unless a public interest is advanced by allowing one to prevail as against the other, the Courts will leave them where they find them. See *Duval* v. *Wellman*, 124 N.Y. 156. However, if the actions of the Petitioner in the instant suit are either more excusable than the actions of the Respondent or if

the public interest will be advanced if the Petitioner is permitted to recover, his suit will not be barred by the *pari delicto* doctrine. It is submitted that on either score, i.e., public interest or on the grounds that he is the more innocent party, the Petitioner is entitled to recover. There is no question but that the suit at bar involves Regulation U and that the sole burden of compliance with Regulation U is on the lender. If that is not enough to tip the scales, then a simple examination of the parties involved and their relative stature and knowledge should be sufficient. On the one hand, we have The Chase Manhattan Bank, undoubtedly, one of the largest financial institutions in the world—knowledgeable to the highest degree—with regard to banking and government regulations pertaining thereto. On the other hand, we have the Petitioner, a Polish immigrant of limited education, who by hint of hard work succeeded in raising himself from a steward on a cargo ship to a customer's man with a Wall Street firm. As a customer's man, his sole function was to sell securities for a commission with only limited experience at the time the loan was made. At this form of work, his income did not exceed $5300 (Exhibit 39). There is of course no equality between the two. In addition the evidence clearly discloses that the bank loans were knowingly made to Petitioner for the express purpose of carrying and purchasing registered securities in excess of their permissible maximum loan value which constituted a violation of Regulation U (Exhibit No. 2 and Exhibit No. 3, 405A).

(3)

The Respondent's brief speaks of errors and omissions in Appendix B of the petition and because of those errors and omissions refers the Court to the District Court's opinion as reported at 290 F. Supp. 74. A careful com-

parison between Appendix B and the printed report in 290 F. Supp. 74 reveals the following errors:

1. Failure to put single quotation marks around the word carrying in the footnote on page 12a and failure to put a quotation mark after the word "stock" at the end of that same footnote.

2. Failure to include the following words, after the word "public" which appears on the tenth line from the top of page 32a, "policy in favor of competition. A more fastidious regard."

Respectfully submitted,

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